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Farm Titles

Benjamin Griffith

lows "Get toilet set and compact for Edith."

A suit to quiet title should be brought in the Supreme Court of the United States to remove this cloud.

4. We advise that you buy some other land.

Yours cheerfully,
Jones, Jones, Jones & Jones,
By Company.

P.S.—There is a mortgage on the property which should be released if, as, and or when paid.

—*Title News*

In Memoriam

Mr. Arthur C. Bartels, long a practicing lawyer of this city and a member of this Association, passed away during the early part of this month.

President Marsh appointed Messrs. Frank N. Bancroft, Herbert M. Munroe, and Charles R. Bosworth, a committee, to attend his funeral as representatives of this Asscciation.

Farm Titles

By Hon. Benjamin Griffith, of the Denver Bar
(formerly Attorney General, State of Colorado)

In the space accorded to the writer, a few observations only may be offered that may prove of some interest to the Profession.

Fortunately for the peace of mind of the average lawyer, the very great acreage of farm lands in the West comes from the original patent of the United States, based upon survey by legal subdivision, and not by metes and bounds as is so often the case in the East.

As is well known, as soon as final proof is made by the entryman, and a Receiver's or Final Receipt is issued to him by the local land office, he has a title which he may sell, mortgage or devise, even though his final muniment of title, the patent has not been and may never be issued.

A somewhat startling complication arises when, e. g. the entryman mortgages his homestead after final receipt. He may still before patent relinquish his homestead to the Government and thus defeat this mortgage, leaving the latter without any title to support it. The only method of avoiding this result is for the mortgagee to file with the Land Office written notice of his mortgage, whereupon a relinquishment is not accepted but the title inures to the mortgagee. The homesteader also by virtue of the Federal Statute may hold his land free from any execution and levy based on a debt incurred prior to the issuance of the patent, without reference to the date of Receiver's Receipt, which often antedates the patent months and even years.

Another very trying and serious problem arises under our State law, over the conveyance or mortgage of a homestead which may have been claimed by husband or wife in the home. The statute not only requires that the officer taking the acknowledgment must certify therein to examining the wife separate and apart from the husband, but that separate examination must be made or the deed is not binding. The average Notary Public will certify to a homestead acknowledgment and pay no attention to the requirements thereof.

A case arose in Western Colorado as follows: A loan of $3,000. was made to a husband and wife who gave as security a deed of trust conveying their farm on which a homestead had been claimed. The deed of trust contained a homestead acknowledgment in due form reciting the separate examination of the wife. Thereafter on foreclosure proceedings, the defense was made that in spite of the certificate of the Notary and the admitted signature of the wife to the deed of trust and the receipt of the loan by husband and wife, yet the wife had not actually been separate and apart from the husband when the acknowledgment was taken. The wife and husband so testified. The Notary Public, Cashier in a bank,—could not recollect clearly the circumstance but stated that in view of the certificate he was satisfied that he had examined the wife separate and apart. The Court on this conflicting evidence found for the husband and wife, and the mortgagee in order to proceed with the foreclosure had to pay $2,000.00, the homestead statutory valuation to the wife and husband, which proved to be a dead loss to the creditor and a windfall to the other parties to the transaction to which they were not, at least, morally entitled.

About the only way that this strange situation can be circumvented is an independent investigation, in addition to the examination of the records, as to what actually took place before the Notary.

Still another bugaboo in farm titles is a deeded water right. The usual abstract covers land but not the water appurtenant to it. But even though it covers water also, the first document in the chain of title is usually a statement of claim to water by all of the original owners of the ditch, which more often than not, is crudely prepared, perhaps not even setting forth the share or part of the water right claimed by each. Later, a decree of adjudication may be shown and as is well known, no matter what its recitals as to the ownership of water by the individuals therein named, such decree is not evidence or proof of title. Then to further complicate matters, some deeds may describe the water rights specifically; others may refer to water rights appurtenant to the land without concrete description of the water while still others may make no reference to water in general or specific terms and yet the title to the water may pass under the general provisions of the deed. So that an abstract to the title of the water may aften throw little light on the actual state of the title. Here again the average lawyer is relegated to an inquiry among the present users and early settlers to ascertain just what water has been used on the tract of land in question, in order to become satisfied as to title.

Fortunately, this situation is being cleared up considerably in recent years by modern methods of doing business. A ditch of any considerable size usually is conveyed to a Corporation and the various interests therein are represented by stockholdings. Such a method has proven to be satisfactory and without complications to the title examiner.

A word of commendation is due the abstractors throughout the State of Colorado for the care and thoroughness with which the usual abstract is prepared. There are abstract companies in this State which abstract the records so thoroughly and so completely that there are many lawyers who prefer to examine such an abstract rather than the record itself. On the other hand, in recent years, an abstractor in one Colorado County, borrowed large sums of money on fictitious titles on abstracts not only prepared by him but on purported deeds, conveyances

and mortgages,—fictitious of course, and which bore a recorder's stamp of the County in question, which recorder's stamp was forged but was identical with the genuine one used in that County,—but as heretofore stated, the instance in question is believed to be the only case, in recent years at least, of fraudulent abstracts.

There are no restrictions in our law with reference to abstract companies or requirements that they must furnish bonds as is so often the case in other States, and yet the abstracts which have been furnished to the legal profession have been, in the opinion of the writer, far above the average of other commonwealths.

Further, the people of this State are apparently satisfied because they have not seen fit, generally, to insure their farm titles nor to have their title registered under what is known as the Torrens Land Act. This Act, known in our statutes as Registration of Land Titles and which may be invoked at the option of the landowner, was first passed some twenty-three years ago.

In a majority of the Counties of the State, there is not a registered title and in practically all of the large Counties, all of the registered titles may be counted upon the fingers of one hand,—which brings us back to the observation that the average hard-working abstractor in this State and the underpaid lawyer, who has examined that abstract, are entitled to no small gratitude from the public for the stability and validity of the average record title in Colorado.

Recent Trial Court Decisions

(*Editor's Note.*—It is intended in each issue of the Record to note interesting current decisions of all local Trial Courts, including the United States District Court, State District Courts, the County Court, and the Justice Courts. **The co-operation of the members of the Bar is solicited in making this department a success. Any attorney having knowledge of such a decision** is requested to phone or mail the title of the case to Victor Arthur Miller, who will digest the decision for this department. The names of the Courts having no material for the current month will be omitted, due to lack of space.)

Denver District Court

DIVISION V JUDGE SACKMAN

Tenants in Common—Deeds of Trust—Redemption—Contribution.

Facts: Partition—Plaintiff and defendant are tenants in common of real estate subject to Deed of Trust to the Public Trustee, securing note of $12,500. After institution of suit, Deed of Trust is foreclosed and property sold thereunder for $25,000. Defendant demands and receives of the public trustee his share of the surplus. Plaintiff redeems. Plaintiff files a Supplemental bill setting up the foregoing facts and praying title to the whole estate be decreed in him. Upon demurrer to the Supplemental bill.

Held: Demurrer sustained.

Reasoning: The redemption of one tenant in common inures to the benefit of the other. The non-redeeming co-tenant is not estopped by the acceptance of his share of the proceeds of the sale. The tenant redeeming is entitled to contribution from his co-tenant. To secure this he has a lien on the co-tenant's share in the premises which lien after demand and refusal of contribution may be enforced by suit to foreclose and sale as if upon